No. 21,689

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

HARRAH'S CLUB, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I.

In its brief, pp. 49-55, the Company repeats the argument made to the Board that the Trial Examiner committed prejudicial error by taking judicial notice of the facts found in the earlier Harrah's Club case, 150 NLRB 1702, enforced 362 F. 2d 425 (C.A. 9), cert. denied, 386 U.S. 915. We anticipated this defense in our main brief, p. 19, fn. 14, by pointing out that the Supreme Court has held to the contrary. Commissioner v. Sunnen, 333 U.S. 591, 598. Accord: N.L.R.B. v. Brown & Root, Inc., 203 F. 2d 139, 146 (C.A. 8). Under the doctrine of collateral estoppel by judgment, in a subsequent proceeding between the parties to the original suit or their privies, matters which were actually determined in and necessary to the first decision may be used as an affirmative part of a party's case. Hyman v. Regenstein, 258 F. 2d 502, 509-510 (C.A. 5), cert. denied, 359 U.S. 913. This rule has been consistently accepted in

proceedings before administrative bodies, including the National Labor Relations Board. See, e.g., United States v. Pierce Auto Freight Lines, 327 U.S. 515; Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705; N.L.R.B. v. Lee-Rowan Co., 316 F. 2d 209, 211 (C.A. 8), cert. denied, 375 U.S. 827; Paramount Cap Mfg. Co. v. N.L.R.B., 260 F. 2d 109, 113-114 (C.A. 8); N.L.R.B. v. Reed & Prince Mfg. Co., 205 F. 2d 131, 139-140 (C.A. 1), cert. denied, 346 U.S. 887. 1/

Here, the Trial Examiner and the Board took judicial notice of the facts of the first Harrah's Club case, and relied upon certain facts there found to shed light upon the events which occurred shortly thereafter, i.e., the withdrawal of tokes from the stage technicians and the discharges of Cole and Lovelady. By using the specific facts of the first decision to shed light upon the purpose and character of subsequent events, the Board has not relied upon past unfair labor practices as the sole basis for finding other unfair labor practices. The Trial Examiner and the Board have simply used events which occurred prior to those alleged in the complaint as background to help explain the events alleged to be unfair labor practices. This practice has long had judicial approval. N.L.R.B. v. Winn-Dixie Greenville, Inc., 379 F. 2d 954, 959-560 (C.A. 4), cert. denied, 389 U.S. 952; Hendrix Mfg. Co.

1/ The only decision expressing a contrary view is N.L.R.B. v. Bill Daniels, Inc., 202 F. 2d 579, 586-587 (C.A. 6), reversed on other grounds, 346 U.S. 918, which the Company cites in its brief. The quotation relied upon is dictum, however, and the sole authority cited for that proposition is 20 Am Jur. 105, § 87. Regardless of the accuracy with which that text formulated and expressed the "general rule" which courts

(Cont.)

v. N.L.R.B., 321 F. 2d 100, 103-104 (C.A. 5); N.L.R.B. v. Combined Century Theatres, Inc., 278 F. 2d 306, 307 (C.A. 2); Wheeler v. N.L.R.B., 314 F. 2d 260, 262-263 (C.A.D.C.); N.L.R.B. v. W.R. Hall Distributor, 341 F. 2d 359, 362-363 (C.A. 10). See also Local Lodge No. 1424, IAM v. N.L.R.B., 362 U.S. 411, 416-417. By taking judicial notice of those facts the Trial Examiner merely shortened the process of re-proving them in the instant case.

The unfair labor practices found in the instant case -- the discriminatory withdrawal of tokes and discharges of Cole and Lovelady -- are not, of course, established by the mere showing that the Company had previously engaged in unlawful conduct. But the prior specific threats to tak reprisals against the employees and to reduce the crew may be added to the other circumstances proved in the case to support the Board's findings. While not conclusive, "anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for Board evaluation in determining motive." N.L.R.B. v. Dan River Mills, Inc., 274 F. 2d 381, 384 (C.A. 5). Demonstrated unlawful hostility and bias do not have to be found within the period encompassed by the complaint. Hence, we submit, the Trial Examiner properly took judicial notice of the facts of the first Harrah's Club case.

1/ (Cont.)
"ordinarily" apply, a number of exceptions are recognized which the court apparently did not consider. See, e.g., 29 Am Jur. 2d, Evidence § 59; 30 Am Jur, Judgments § 371. In view of the cursory consideration which the Sixth Circuit gave to this area of the law, we submit that Bill Daniels is not entitled to much weight on this point, and that the better view is expressed by the authorities relied on by the Board here and in our main brief.

II.

The Company argues (Br. pp. 48-49) that the Board improperly ordered it to make the stage technicians whole for losses suffered by them by the withdrawal of tokes. The Company insists that the amounts involved are too difficult to estimate, and that the Board's order is punitive.

The mere fact that the compilation of amounts owed to employees may be difficult to ascertain is not a sufficient reason for denying that remedy. Thomason Plywood Corp., 109 NLRB 898, 910; Pacific Intermountain Express, Inc., 107 NLRB 837, 849. Thus, employees have been awarded such hard-to-estimate sums as the cash equivalent of room and board on a ship (American Range Lines, Inc., 13 NLRB 139, 154-155), moving expenses for a family and its effects (Symns Grocer Co., 109 NLRB 346, 349), the use of a demonstrator car (M.J. McCarthy Motor Sales Co., 147 NLRB 605, 609), Christmas bonuses and profit-sharing plans (Oman Constr. Co., 144 NLRB 1534, 1558; N.L.R.B. v. U.S. Air Conditioning Corp., 336 F. 2d 275, 277 (C.A. 6)). Amounts for willful loss of earnings -- that is, estimated earnings a discharged employee should have earned -- are deducted from back pay. N.L.R.B. v. Cowell Portland Cement, 148 F 2d 237, 246 (C.A. 9); Oman Constr. Co., supra, 144 NLRB at 1537-1538. Similarly, the Board has ordered employers to make whole their employees for loss of tips. Club Troika, Inc., 2 NLRB 90, 94; Willard, Inc., 2 NLRB 1094, 1108. Respondent has shown no reason why a different result is warranted here. Nor will the Company have the burden of making the estimate, for the burden of proof as to the amounts involved will rest upon the General Counsel. N.L.R.B. v. U.S. Air Conditioning Corp., supra, 336 F 2d at 277. The

Company cannot rationally complain that the Board's order is punitive. It merely restores the status quo ante, which from the employees' standpoint is remedial only -- they receive no windfall by virtue of the Board's order.

III.

The Company argues that its offers of reinstatement to Cole and Lovelady were valid. This contention is without merit.

As explained in our opening brief, an offer of reinstatement which imposes unreasonable conditions upon an employee, including an unusually short reporting time, is invalid. The reason why the Board's opening brief fails to mention "a host of decisions" cited by the Company (Br. pp. 60-70) is that they are clearly inapposite.

What is a reasonable length of time to report for reinstatement is, of course, a matter dependent upon the surrounding circumstances. Thus, in White Sulphur Springs Co. v. N.L.R.B., 316 F. 2d 410, 415 (C.A. D.C.), although the employees were asked to return to work only a few days later, the offers of reinstatement were made on the day after the discriminatory conduct occurred. In Nevada Tank & Casing Co., 131 NLRB 1352, 1353, the Company's offer of reinstatement asked the employees to report or reply within 48 hours. It would appear reasonable to ask an employee to decide within 48 hours whether he is willing to return to work. "The employer certainly /is/ entitled to know where it /stands/. . . " White Sulphur Springs Co. v. N.L.R.B., supra, 316 F. 2d at 415. But if an employee has relocated, found new work and entered into new obligations, sufficient time should be allowed for him to wind up his affairs before

reporting back to his old job.[2/] In Nashville Display Co., 93 NLRB 1310, 1318, several employees were laid off on January 19. On Saturday, January 21, the Company offered reinstatement to the employees effective January 23. Here again, although the employees were asked to report to work two days later, the layoff had occurred only two days earlier. The employees would have had little opportunity to make plans which would make the specified reporting date unreasonable.

In contrast to the situations in the above cases, the offers of reinstatement in the instant case were made nearly four months after the discriminatory discharges. Both employees had relocated from Stateline, Nevada, to the Bay Area in California. In each case the offer demanded that the employee report for work four days later. We submit that, in these circumstances, the Board quite properly held that the offers of reinstatement imposed unreasonable reporting dates upon the employees. Fred E. Nelson, etc., 102 NLRB 780, 783, enforced 208 F. 230 (C.A. 3); Thermoid Co., 90 NLRB 614, 615-616.

CONCLUSION

For the reasons stated herein, as well as those stated in our opening brief, it is respectfully submitted that a decree should issue

2/ Thus, in Nevada Tank & Casing Co., at least one employee reported to work a month after the offer of reinstatement.

enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and is his opinion of the tendered brief conforms to all requirements.

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March 1968.